United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2104

No. T74-8274

In the

United States Court of Appeals

For the Second Circuit

LEVIN, ET AL.,

Petitioners-Appellees,

vs.

MISSISSIPPI RIVER CORPORATION, ET AL.,
JACOB R. COHEN and JUNE COHEN,

Objectors-Appellants,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.
HONORABLE EDWARD WEINFELD, DISTRICT JUDGE

BRIEF FOR OBJECTORS-APPELLANTS

MICHAEL PAUL COHEN
7319 North Oakley
Chicago, Illinois 60645
WILLIAM HEIMOWITZ
535 Fifth Avenue
New York, New York 10017
Attorneys for Objectors-Appellants

Gunthorp-Warren Printing Company, Chicago • 346-1717

2

TABLE OF CONTENTS

TABLE OF CONTENTS - continued

TABLE OF CASES

ENCYCLOPEDIA

T74-8274

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LEVIN, et al.,

Petitioners-Appellees

vs.

MISSISSIPPI RIVER CORPORATION, et al.,
JACOB R. COHEN and JUNE COHEN,

Objector-Appellants

Appeal from the United States District Court
for the Southern District of New York

Honorable EDWARD WEINFELD, District Judge

BRIEF FOR OBJECTOR-APPELLANTS

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. DID THE COURT ERR IN APPROVING FEES BASED ON THE THEORY THAT MOPAC'S COMMITMENT TO PAY ONE-HALF THE ALLOWED FEES MAY BE CONSIDERED AN ADDITIONAL CASH PAYMENT TO THE CLASS B SHAREHOLDERS AS PART OF THE SETTLEMENT, SO THAT WHAT THEY RECEIVED IS ON A NET BASIS?

2. DID THE COURT MISCONSTRUE THE FEE PORTION OF THE SETTLEMENT AGREEMENT?

3. IS ANY AGREEMENT BY THE PARTIES TO PAY ATTORNEYS' FEES SOLELY ON THE BASIS OF THE REASONABLE VALUE OF THOSE SERVICES TO MOPAC'S CLASS B STOCKHOLDERS PROPER?

4. MAY FEES BE ASSESSED AGAINST MOPAC WHERE THERE IS NO STATUTORY PROVISION OR COURT PRECEDENT FOR THE ASSESSMENT OF ATTORNEYS' FEES UNDER THE FACTS IN THIS CASE?

5. CAN MOPAC BE REGARDED AS A REPRESENTATIVE OF ALL ITS SHAREHOLDERS FOR THE PURPOSE OF HAVING THEM SHARE THE COST OF LITIGATION BY THE ALLOWANCE OF FEES AGAINST IT?

6. MAY FEES BE ASSESSED AGAINST MOPAC WHERE THE PETITIONERS FOR FEES ARE UNABLE TO ESTABLISH THAT EACH GROUP OF STOCKHOLDERS BENEFITED PROPORTIONATELY TO THEIR INTEREST IN THE CORPORATION?

7. WERE THE BENEFITS, IF ANY, TO MOPAC RELATED TO THE ACTIVITIES OF THE PETITIONERS IN THIS CASE OR THE ALLEGATIONS WHEN FILED?

8. ARE THE SERVICES RE THE DERIVATIVE COUNTS COMPENSABLE WHERE THEY WERE NOT RELATED TO THE SETTLEMENT AND MOPAC RECEIVED NO BENEFIT FROM SUCH SERVICES?

9. IS THE BURDEN ON THE PETITIONERS TO SHOW WHICH OF THE CLAIMED FEES AND EXPENSES ARE FOR SERVICES WHICH DIRECTLY PRODUCED THE BENEFIT, IF ANY, TO MOPAC?

10. IN DETERMINING WHAT FEES, IF ANY, SHOULD BE ALLOWED SHOULD CONSIDERATION BE GIVEN TO THE DUPLICATION OF EFFORT BY PETITIONERS AND THE OFFSETTING OF EXPENSES INCURRED BY MOPAC IN DEFENDING CLAIMS WHICH HAD NO MERIT?

11. IS THE SLAYTON CASE RES JUDICATA ON THE QUESTION OF THE ALLOWANCE OF FEES IN THE VOTING RIGHTS LITIGATION?

12. MAY THE COURT ALLOW FEES BASED ON PRIOR LITIGATION INVOLVING DIFFERENT ISSUES?

13. DID THE COURT ERR IN FINDING THAT "UNDER THE TERMS OF THE SETTLEMENT, THE ALLOWANCES AWARDED BY THE COURT ARE TO BE PAID <u>EQUALLY</u> BY THE CORPORATE DEFENDANTS?"

STATEMENT OF THE CASE

This is an appeal from a judgment by Judge Edward Weinfeld allowing attorneys' fees to plaintiffs in a stockholders' class action and derivative suit. The suit was settled before trial and the settlement was approved in Levin v. Mississippi River Corp., 59 F.R.D. 353 (1973).

The capitalization of Missouri Pacific Railroad (MOPAC) has been the subject of controversy and litigation for many years. The holder of a majority of MOPAC's Class A stock, the Mississippi River Corporation, and Class B shareholders have been at odds over their respective rights and interests and for years have attempted to work out a recapitalization which would be acceptable to all stockholders.

The facts are not in dispute and the appellants agree to the chronology of the events set forth by the petitioners in their affidavits and memorandums.

The action which led to this appeal was instituted by plaintiff Levin, a Class B stockholder, in December, 1967. Thereafter, Alleghany, which owned a majority of Class B stock, and another Class B stockholder, Levasseur, intervened.

In September, 1968 Judge Bryan ordered that the action be maintained as a class action on behalf of all Class B stockholders. The thrust of the complaints of all three plaintiffs was directed toward the dividend policy with

respect to the Class B stock. From 1964 to 1971 the annual dividends paid on the A stock were $5.00 per share. During that same period annual dividends declared and paid on the Class B stock have been $5.00 per share.

In substance, three separate claims were asserted against Mississippi and the three individual defendants. Under the first cause of action plaintiffs claimed that the dividends declared and paid by MOPAC have been unreasonably low; that Mississippi has misused its majority voting stock power by causing MOPAC's Board of Directors to limit dividends on the Class B stock to $5.00, the maximum permissible per share dividend payable on the Class A stock, despite the enormous differences in the equity value between the two classes, and notwithstanding the availability in each year of net income for increased dividends after meeting the requirements on the Class A stock.

The second cause of action charged a conspiracy by Mississippi and members of MOPAC's Board of Directors to "freeze out" the Class B stockholders by improperly limiting the dividends paid on the Class B stock, making public statements denigrating the market value of the Class B stock, and attempting to appropriate the equity of the Class B stockholders through the plan of consolidation of MOPAC with T&P, proposed in 1963.

The third cause of action further alleged that the

various acts and conduct alleged in the second cause of action were in violation of Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5, promulgated thereunder, and of defendants' common law fiduciary duty owed the Class B stockholders. The plaintiffs sought judgment that the Court direct MOPAC to pay reasonable dividends for the past years, from 1964 to 1971, to all Class B stockholders; that MOPAC be directed to pay reasonable dividends on the Class B stock in the future; and to award plaintiffs their costs, expenses and reasonable counsel fees incurred in the prosecution of the action.

In addition to the class action claims, Levin and LeVasseur separately asserted derivative claims on behalf of MOPAC. One alleged that the defendants have failed to cause MOPAC to replace the Class A stock with debentures or other interest bearing securities, which would materially reduce MOPAC's income tax; however, as to this derivative claim, no specific relief was sought. A further derivative claim on behalf of MOPAC was for the recovery of the costs and expenses incurred by it in connection with the 1963 T&P consolidation plan and the Class B voting rights action where the B stockholders won the right to vote separately from the A stockholders on a plan of consolidation. See Levin v. Mississippi Fuel Corp., 386 U.S. 162 (1967).

The defendants in their answers denied the material allegations of the complaints and set up affirmative defenses,

including, with respect to the dividend cause of action, business justification (59 F.R.D. 359-360).

"While engaged in concluding their expanded pretrial activities, the parties intensified efforts to effect an amicable settlement. ... The negotiators recognized that central to a lasting resolution of the conflict between the two stockholders' interests was the elimination of the underlying cause of the strife, a result not obtainable whatever the final outcome were the case to proceed to trial, and it was this concept which led to a settlement on the basis of a restructured capitalization." (59 F.R.D. 360).

The proposed settlement, which was later approved by the Court, provided for the following:

(1) Each share of Class A stock would be converted into one share of $5.00 cumulative preferred stock, with a liquidating preference of $100.00 per share, convertible into one share of new common after one year following ICC authorization of the issuance of new securities and redeemable at the option of MOPAC for $100.00 per share, after December 31, 1975. This would require the issuance of 1,864,052 shares of the new stock to the present holders of the Class A stock, of which Mississippi would be entitled to receive 1,158,395 shares;

(2) each share of Class B stock would be converted

into 16 shares of new common stock and $850.00 cash. This would require the issuance of 635,696 shares of new common stock to the present holders of Class B stock, of which Alleghany would be entitled to receive 339,888 shares; this would require a cash payment by MOPAC of $33,771,350.00;

(3) both preferred stock and common stock would have one vote per share;

(4) the Plan and amendment would have to be approved by 75% of the outstanding shares of each class of MOPAC stock, including a majority of the shares of each class other than those held by Mississippi and Alleghany -- that is, a majority of the minority stockholders of each class;

(5) the issuance of the new shares would have to be approved by the Interstate Commerce Commission;

(6) upon such approvals, Mississippi was required to make a cash tender offer to all Class B stockholders for at least 400,000 shares (approximately 63%) of the new common stock, at $100.00 per share, and Alleghany (but not the minority B shareholders) would tender all its new common stock (339,888 shares). If more than 400,000 shares were tendered, Mississippi may purchase the shares on a pro rata basis; this would require a cash payment by Mississippi of at least $40,000,000.00;

(7) all claims asserted in this action and any other claims against the defendants which are based upon or arise from

any of the matters alleged in the complaints, regardless of the legal theory upon which they are based, would be dismissed with prejudice;

(8) fees awarded to plaintiffs' attorneys will be paid by MOPAC and Mississippi. (59 F.R.D. 361)

Pursuant to the settlement agreement Alleghany Corporation and attorneys for plaintiffs, Betty Levin and Robert LeVasseur, made application for attorneys' fees. Alleghany Corporation applied for $850,000.00 and counsel for plaintiffs, Levin and LeVasseur, applied for $2,000,000.00 plus actual disbursements for services performed and expenses incurred. Defendants, MOPAC and Mississippi River Corporation (MRC) agreed that they would not oppose these applications subject to certain disclaimers. (Memorandum of Corporate Defendants in Answer to Fee Applications of Plaintiff, Alleghany Corp., and Attorneys for Plaintiffs, Levin and LeVasseur, 1-3)

A hearing on the application was held on March 26, 1974, and the Court rendered its decision on June 26, 1974. It was decreed that Alleghany Corporation receive $850,000.00 and that the attorneys for Levin and LeVasseur receive $1,750,000.00 as legal fees and the further sum of $22,422.06 as disbursements. The above sums are to be paid in equal parts by defendants, MOPAC and MRC.

Attorneys for plaintiffs, Levin and LeVasseur, based their application for fees on the benefit conferred on the

Class B stockholders, which they estimated at $100 million and the 11,083¼ hours spent on the litigation (Brief of Counsel for Plaintiffs, Levin and LeVasseur, in Support of their Application for Allowance of Fees and Expenses, pp. 12-15). They also contend that the allowance for fees should include the services rendered in previous litigation, even though the Court of Appeals in Missouri Pacific R.R. Co. v. Slayton, 407 F. 2d 1078 (1969), denied all applications for an allowance against MOPAC in the voting rights litigation. See Levin v. Mississippi Fuel Corp., 386 U.S. 162 (1967) (Brief of Counsel for Plaintiffs, Levin and LeVasseur in Support of Their Application for Allowance of Fees and Expenses, pp. 25, 36).

Alleghany Corporation based their application for fees on fees paid to their attorneys in the instant action, expenses, and fees paid to consultants (Appendix, pp. 1-4). It made no claim for fees expended in prior litigation.

These objectors appeared at the March 26, 1974 hearing and objected to the payment of any fees or allowances by MOPAC.

SUMMARY OF ARGUMENT

It is the objectors' position that no fees be paid by the Missouri Pacific Railroad to the petitioners. As a general rule, fees are not assessed against a losing party unless specifically provided for by statute or enforceable contract. (Fleischmann v. Maier Brewing Co., 386 U.S. 714 at 717 (1967); Missouri Pacific Railroad Company v. Slayton, 407 F. 2d 1078 at 1083 (1969); Grace v. Ludwig, 484 F. 2d 1331 at 1332) (1973). There are exceptions to this rule under which attorneys' fees may be awarded to successful plaintiffs in corporate litigation. The theory there is that a party who has expended funds, or attorneys who have rendered services which resulted in a benefit to the corporation's stockholders, should be reimbursed by all the members of the class who benefited from these efforts. By assessing attorneys' fees against a corporation in such cases, the expense of the litigation is spread equally among the corporate stockholders which are the benefited class. (Mills v. Electric Auto-Lite Company, 396 U.S. 375 at 391-392 (1970)).

The cases allowing attorneys' fees against the corporation are inapplicable to the instant claim because the stockholders who would indirectly pay these fees do not form a single class. Instead, there are four distinct classes involved: (1) the majority Class A stockholders, (2) the minority Class B stockholders, (3) the Alleghany Corporation, and (4) the minority Class A stockholders. Each class derived differing

benefits, if any, from the settlement. Yet the payment of fees by the Missouri Pacific Railroad would result in assessing this cost equally among all the classes of stockholders. Therefore, no part of the fees should be paid by the Missouri Pacific Railroad.

Even where the corporation from whom fees are sought has derived some benefits in the form of a settlement, the courts have erected safeguards against the abuse of the process. The following safeguards are equally applicable to cases as this one where attorney's fees are agreed upon between the parties. If the rule was otherwise, it would be in the plaintiff's lawyers' interest to compromise a case for a small settlement and large attorney's fees. Norman v. McKee, 290 F. Supp. 29 (1968). These requirements are that: (1) there be a statutory provision, contractual provision, or court precedent allowing attorney fees; (2) fees be paid by the corporation only if the plaintiff can demonstrate that the corporation represents the class benefited from the settlement (Chrysler Corporation v. Dann, 223 A. 2d 384 at 386 (1966); Maurer v. International Re-Insurance Corporation, 33 Del. Chan 456 (1953); (3) the services rendered by the plaintiffs' attorneys had a direct and casual relationship to the benefits conferred (Kahan v. Rosenstiel, 424 F. 2d 161 at 167 (1970); (4) the alleged benefits were directly related to a meritorious claim set forth in the complaint at the time it was filed (Kahan v. Rosenstiel, supra). These requirements are not met in this

case. These appellants also contend that fees should not be allowed or, in the alternative, be reduced for the following reasons:

(1) The court misconstrued the settlement agreement in that it did not provide that MOPAC and MRC share equally in the payment of attorneys' fees and expenses.

(2) If there were an agreement that MOPAC pay plaintiffs' attorneys' fees so that the fruits of the settlement would be "net" it would be improper. (Norman v. McKee, 290 F. Supp. 29 (1968)

(3) MOPAC is not representative of all its shareholders and therefore should not have to pay fees for a settlement which did not benefit the corporation as a whole. (Mills v. Electric Auto-Lite Company, 396 U.S. 375 (1970)

(4) The services regarding the derivative counts should not be compensable because they were not related to the settlement and MOPAC received no benefit from such services. (Chrysler Corporation v. Dann, 223 A. 2d 384 (1966)

(5) The appellees should not be paid fees or expenses for any duplication of effort. (Dann v. Chrysler Corp., 215 A. 2d 709 at 717 (1965).

(6) Fees and expenses for the voting rights litigation should not be allowed because (a) the voting rights litigation involved different issues from the instant case, and (b) Missouri Pacific Railroad Company v. Slayton, 407 F. 2d 1078 (1969) is res judicata as to the allowance of fees to the appellees in the voting rights litigation.

As minority Class A stockholders, these objectors have no objection to the payment of fees by others than the Missouri Pacific Railroad, but do object to the payment by the Railroad (since that will be borne in part by Class A stockholders) because the conditions precedent for such payment outlined above have not been met and because they received little benefit, if any, from the settlement when contrasted with the benefits which accrued to the other classes.

ARGUMENT

I.

THE DISTRICT JUDGE ERRED IN APPROVING FEES BASED ON THE THEORY THAT "MOPAC'S COMMITMENT TO PAY ONE-HALF THE ALLOWED FEES MAY BE CONSIDERED AN ADDITIONAL CASH PAYMENT TO THE CLASS B SHAREHOLDERS AS PART OF THE SETTLEMENT, SO THAT WHAT THEY RECEIVED IS ON A NET BASIS. ACCORDINGLY, THE SOLE ISSUE THAT REMAINS IS WHAT IS A FAIR AND REASONABLE ALLOWANCE FOR THE SERVICES BY THE RESPECTIVE APPLICANTS." (Judge Weinfeld's Opinion allowing fees, page 3)

A. The Court has misconstrued the fee portion of the settlement agreement. It does not provide that the corporate defendants will make additional cash payments to the Class B shareholders for attorneys' fees. The settlement only provides that the corporate defendants will not oppose the granting of fees which they deem to be reasonable. There may be an agreement (there usually is in class actions of this nature) between the individual plaintiffs and their attorneys that the clients will not be responsible for the payment of attorneys' fees, and that counsel will rely solely on allowances made by the Court pursuant to the usual rules in such cases. This construction is clearly supported by the disavowal by the corporate defendants of any agreement that "time expended in prior litigation may serve as a basis for an award of fees in this case." (Memorandum of Corporate Defendants In Answer to Fee Applications, page 3)

Since the application for fees by the attorneys for

the individual plaintiffs relies heavily on such prior services, it is obvious that the settlement agreement cannot be construed to provide for the payment by the corporate defendants of all the Class B stockholders' legal fees.

B. Any agreement by MOPAC to pay fees to the plaintiffs' attorneys solely on the basis of the reasonable value of those services to the plaintiffs' clients would be improper.

Civil Rule II B of the District Court, which provides that a fee for attorneys in a derivative or class action shall not be paid except as allowed by the Court after hearing, clearly contemplates that the agreement of the parties does not govern the allowance of fees. The purpose of the rule is to remove the prospect of allowance of attorneys' fees as an incentive for bringing non-meritorious class actions in hope of a settlement or to be an influence in determining the terms of that settlement before acting on allowance for fees. Even though a settlement be fair, the criteria for allowance of fees remains standard, since it must be so applied as to a continual deterrent against abuse in all class actions. It is obvious that the criteria used by the Court which relies heavily on the benefits accruing to the plaintiff class is not the sole criteria and will not alone effectuate the purposes of Rule II B.

In City of Philadelphia v. Chas. Pfizer, 345 F. Supp. 454 at 471 (1972) the court said, "A plaintiff's lawyer who

has an agreement that defendants will pay his fees has a strong motive so to conduct himself that defendants will not question or oppose the amount for which he ultimately applies as a fee."

"There can be no blinking at the fact that the interests of the plaintiff in a stockholders' derivative suit and of his attorney are by no means congruent. While in a general sense both are interested in maximizing the recovery, this is only a half-truth. Even apart from special considerations which, as has been noted, may cause special divergence of interest in cases where extremely large amounts are at stake ..., there is a difference in every case. The plaintiff's financial interest is in his share of the total recovery less what may be awarded to counsel, simpliciter; counsel's financial interest is in the amount of the award to him less the time and effort needed to produce it. A relatively small settlement may well produce an allowance bearing a higher ratio to the cost of the work than a much larger recovery obtained only after extensive discovery, a long trial, and an appeal. The risks in proceeding to trial vary, even more essentially. For the plaintiff, a defendant's judgment may mean simply the defeat of an expectation, often of relatively small amount; for his lawyer it can mean the loss of years of costly effort by himself and his staff. In this respect, a derivative action is in quite different posture from a personal injury action conducted on a contingent basis. ..." (Saylor

v. Lindsley, 456 F. 2d 896 (2d Cir. 1972) (Emphasis added).

Thus, the appropriate basis for the allowance of fees in class actions which result in a settlement must be the same as those prevailing in cases where results accrue from the disposition of the litigation by trial. If the rule was otherwise, and an incentive would exist for plaintiffs' lawyers to arrive at a settlement by compromise which may be disadvantageous to the class if the settlement would result in a greater fee than the attainment of the same result by trial.

C. The criteria for allowance of fees to be paid by defendants in successful class actions are as follows:

1. A statutory or contractual provision or count precedent allowing attorney's fees under the facts in this case.

2. The corporate defendant must represent the class which benefited from the settlement.

3. The services rendered by the plaintiffs had a direct and casual relationship to the benefits conferred.

4. The alleged benefits were directly related to a meritorious claim set forth in the Complaint at the time it was filed.

D. The agreement by MOPAC not to oppose the allowance

of fees is entitled to little weight since it is controlled by MRC to whose interest it is to have MOPAC share the costs which it might otherwise be required to pay.

The Court in Taussig v. Wellington Fund, Inc., 313 F. 2d 472, at 479 (1963) held that where defendants who control a corporation stand to lose by the continued prosecution of the suit and to gain by its dismissal (as in this case), approval of the settlement by the corporation may not be considered as its objective act.

II.

UNDER THE SLAYTON CASE AND OTHER SIMILAR DECISIONS, NO ATTORNEYS' FEES MAY BE ASSESSED AGAINST THE MISSOURI PACIFIC RAILROAD BECAUSE THERE IS NO STATUTORY PROVISION OR COURT PRECEDENT FOR THE ASSESSMENT OF ATTORNEYS' FEES AGAINST A DEFENDANT UNDER THE FACTS IN THIS CASE.

Certainly, petitioners should not be in a better position to receive reimbursement for fees as a result of a settlement than if they had obtained the relief they sought in their complaint. Missouri Pacific Railroad v. Slayton, 407 F. 2d 1078 (1969) involved an appeal by MOPAC from a judgment requiring it to pay attorneys' fees in connection with suits brought against it by the plaintiffs in this action for declaratory judgment. The ultimate issue in controversy in the declaratory judgment action was whether the Missouri Pacific Railroad's Class A and Class B stockholders were entitled to vote separately on a plan of consolidation entered into between the Railroad and the Texas and Pacific Railway Company.

In Levin v. Mississippi River Fuel Corp., 386 U.S. 162 (1967), the Supreme Court held that each class was entitled to vote separately and the matter was remanded to the District Court for further proceedings consistent with its opinion. Applications for attorneys' fees were filed by attorneys for each of the victorious plaintiffs, and an evidentiary hearing was held. The District Court allowed attorneys' fees and expense reimbursement. On appeal, the Court of Appeals reversed. (Missouri Pacific v. Slayton, 407 F. 2d 1078 (1969) The Court reversed on two grounds: (1) Quoting from Fleischmann Distilling Corp. v. Maier Brewing Company, 386 U.S. 714 (1967), the Court stated that "The rule here has long been that attorneys' fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." The Court further stated that "No statutory or contractual provision for attorneys' fees is present in the case before us." "None of the exceptions recognized in Fleischmann approaches our present situation." (407 F. 2d 1082, 1083)

The benefits obtained for the Class B stockholders from litigation far outweigh any indirect benefit MOPAC may have derived as a result of the suit (this point will be discussed in more detail, infra), and, thus, if anyone should pay attorneys' fees it should be the Class B stockholders and Mississippi. The Slayton case is almost identical to this matter in that there is no statute or enforceable contract authorizing recovery of fees and only the B stockholders and

Mississippi obtained any significant benefits.

III.

THE MISSOURI PACIFIC RAILROAD MAY NOT BE REGARDED AS A REPRESENTATIVE OF ALL ITS STOCKHOLDERS FOR THE PURPOSE OF HAVING THEM SHARE THE COST OF LITIGATION BY THE ALLOWANCE OF FEES AGAINST IT UNDER THE THEORY OF MILLS V. ELECTRIC AUTO-LITE COMPANY, 396 U.S. 375 (1970) AND DERIVATIVE ACTION SUITS BECAUSE MISSOURI PACIFIC STOCKHOLDERS ARE NOT A SINGLE CLASS.

The Auto-Lite case involved a stockholders' action to set aside a corporate merger and to obtain such other relief as might be proper based on a proxy statement that was materially false or misleading. After holding that the plaintiffs had established a violation of the security's laws by their corporation and its officials, the Court went on to say that the plaintiffs should be reimbursed by the corporation or its survivor for attorneys' fees. At 396 U.S. 392, the Court stated, "To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense.

This suit does not present such a situation. In Auto-Lite the dissemination of misleading proxy solicitations was a 'deceit practices on the stockholders as a group.'" (Emphasis added) As will be shown in (4) infra, the stockholders of the Missouri Pacific Railroad were not equally affected as a group.

IV.

FEES MAY BE ASSESSED AGAINST THE MISSOURI PACIFIC RAILROAD ONLY IF THE PETITIONERS CAN ESTABLISH THAT EACH GROUP OF STOCKHOLDERS BENEFITED PROPORTIONATELY TO THEIR INTEREST IN THE CORPORATION. THE BENEFITS TO MINORITY CLASS A STOCKHOLDERS, IF ANY, ARE INFINITESIMAL COMPARED TO THOSE OF THE OTHER GROUPS, AT BEST IMPOSSIBLE OF APPORTIONMENT AND SHOULD BE DISREGARDED AS "DE MINIMIS."

As in the Slayton case, most of the benefits of this settlement are realized by the Class B stockholders. The Class B stockholders receive $850.00 per share. (Levin v. Mississippi River Corp., 59 F.R.D. 353 at 360 (1973)) This is the only real fund created by the settlement. They will probably also receive increased dividends in the future. The Board of Directors anticipate that the annual dividend rate will be $5.00 per share on each class of stock to be issued under the plan. With the Class B stockholders receiving 16 shares of new stock for their present one share, the dividend return will be $80.00 per annum as against the current $5.00 per share. Alleghany, the majority Class B stockholder, will be able to divest itself of its interest at a price it could not realize on the open market. Under the terms of the settlement, each share of Alleghany B stock will be converted into $850.00 plus 16 shares of common stock. The common stock will then be tendered to Mississippi River Corporation for $100.00 per share. Thus, Alleghany will end up receiving $2,450.00 for each share of B stock. The Class B stock is traded in on the over the counter market; the market is thin, and the traders are few. The market

for the Class B stock has ranged between $1,100.00 and $2,500.00 per share. See May 8, 1973 Notice to Stockholders, page 19, and Levin v. Mississippi River Corp., 59 F.R.D. 353 (1973).

As the court stated in Slayton, "The corporate funds in our present situation have not been enhanced or increased by plaintiffs' action nor has plaintiffs' action in any substantial manner preserved funds that would otherwise be lost to the corporation. (407 F. 2d 1083)

"There is no value placed upon such benefits (to MOPAC) nor is such benefit weighed against the benefit derived by the Class B shareholders as a result of the litigation." (407 F. 2d 1080)

Two further quotes from Slayton are applicable here: "It is undisputed that the Class B stockholders obtained a very substantial benefit from the litigation they instituted ... " "The benefits obtained for the Class B stockholders far outweigh any indirect benefit MOPAC may have derived ... " (407 F. 2d 1081)

The petitioners recognize the fact that the Class B stockholders, rather than the Missouri Pacific Railroad Company, derived the benefits of the settlement. On page 2 of their application for fees the attorneys for plaintiffs, Levin and LeVasseur, state: "The litigation was concluded by a settlement agreement that conferred a benefit of about one hundred million dollars on the Class B stockholders of defendants, Missouri

Pacific Railroad Company ('MOPAC'). The obligation to pay fees would normally rest upon the benefited class, namely, the Class B stockholders (emphasis added)." Similar statements can be found in the Memorandum in Support of the Application of Alleghany Corporation for Fees and Expenses on pages four through seven.

As the court stated in Slayton, "It is elementary that a corporation is an entity separate and distinct from its stockholders and that earnings of a corporation remain the property of the corporation until severed and distributed as dividends and that a corporation cannot be required to pay obligations which are not its own but those of some of its stockholders." (407 F. 2d 1082)

Mississippi River Corporation has taken over undisputed control of the Missouri Pacific Railroad (MOPAC). The action against it and its directors has been dismissed. Levin v. Mississippi River Corp., 59 F.R.D. 353 at 361 (1973) They are released from all claims and demands which were asserted against them.

The sole power to determine the affairs of MOPAC vested in the Mississippi River Corporation removes the checks and balances available when Alleghany had a voice in its affairs.

Minority Class A stockholders who invested because of the attractive income of these shares have no priority in

payment of dividends over the former Class B stockholders where conversion is so effectuated. The litigation in this case and in prior cases resulted from action by Mississippi River Corporation and the Board of Directors which it dominated. Considerable expense was incurred by MOPAC in defense of this litigation. The Mississippi River Corporation has acknowledged its responsibility and culpability by an offer to pay part of the attorneys' fees awarded. It has not offered to pay any of the expenses or the time of MOPAC's officers, employees and attorneys in defense of the litigation.

As a result of the settlement, MOPAC will no longer have available $32,000,000.00. In fact, MOPAC has had to arrange for a bank loan of up to $30,000,000.00 to finance payment of $850.00 per share to holders of Class B stock. This loan provides that MOPAC may not make "restricted payments" (principally dividends or distributions on or purchases or retirements of capital stock) unless these payments do not exceed certain specified amounts. These restrictions certainly do not strengthen MOPAC's financial position, not to mention the interest which has to be paid on the loan, and they are clearly in derogation to the interests of the Class A stockholders.

The following quote from Slayton sums up these objectors' contentions as to this point:

> "No new fund was created for the corporation nor were any assets of the corporation preserved.

"The benefit to the Class B stockholders resulting from the legal victory were substantial. No unreasonable burden will be placed on the plaintiffs by their obligation to pay reasonable fees to counsel whom they employed. In fact, Alleghany has already paid or arranged to pay its attorneys for the work they have done." (Emphasis added) (407 F.2d 1083)

V.

THE BENEFITS, IF ANY, TO MOPAC ARE NOT RELATED TO THE ACTIVITIES OF THE PETITIONERS IN THE INSTANT CASE NOR TO THE ALLEGATIONS WHEN FILED. THE SETTLEMENT WAS DESIGNED TO GIVE MISSISSIPPI RIVER CORPORATION UNDISPUTED CONTROL AND THESE ACTIVITIES PREDATED THE INSTANT LAWSUIT AND WERE NOT A RESULT OF IT.

In order for the petitioners to be eligible to receive attorneys' fees from MOPAC, the benefits derived by MOPAC must have a causal connection to the litigation. That is, but for the litigation, the benefits conferred upon the corporation would not have come into being. In Grace v. Ludwig, 484 F. 2d 1331 (1973), the court denied the petitioners' fees, in part, because the petitioners failed to show that but for their intervention the benefited class would not have benefited. Furthermore, the benefits must be related to allegations and the relief prayed for in the complaint when filed. Chrysler v. Dann, 225 A. 2d 384 (1966) These conditions do not exist here.

The court in Kahan v. Rosenthal, 424 F. 2d 161 at 167 (1970) made this point when it stated that "It is necessary to determine, however, that where a suit is filed, it is meritorious and that it is the plaintiff's effort which caused others to benefit."

Negotiations to recapitalize MOPAC started long before the instant complaint was filed, and as Judge Weinfeld stated: "The negotiators recognized that central to a lasting resolution of the conflict between the two stockholder interests was the elimination of the underlying cause of the strife, a result not obtainable whatever the final outcome were the case to proceed to trial." (Emphasis added) 59 F.R.D. 360. Nowhere in the complaint did the plaintiffs pray for remedies that even remotely resembled the final negotiated recapitalization.

The pressures for agreement and the self-interest of the protagonists were such that consensus would have occurred independently of the present litigation.

In reality the settlement can be related to the instant action only on the basis that with the agreement on a recapitalization this litigation became moot.

VI.

SERVICES RE THE DERIVATIVE COUNTS ARE NOT COMPENSABLE BECAUSE THEY WERE NOT RELATED TO THE SETTLEMENT AND MOPAC RECEIVED NO BENEFIT FROM SUCH SERVICES.

In determining what fees, if any, MOPAC shall be required to pay to plaintiffs, no consideration should be given for any services rendered in re the derivative counts because: (1) Plaintiffs failed to establish these causes of action were meritorious, (2) they were not related to the settlement, and

(3) MOPAC derived no benefit from such services. (See discussion, supra).

The Court, at 59 F.R.D. 366, indicates that the plaintiffs' chances of success in re the derivative actions "at best can only be a cautious prophecy." This falls far short of the reasonable likelihood test enumerated in Chrysler v. Dann, 233 A. 2d (Del. Chan.) 384, at 387 (1966). Of course, nowhere in the derivative counts is a recapitalization prayed for since as a part of the settlement, the derivative counts were dropped. MOPAC can hardly be said to have benefited from the petitioners' efforts in this area.

VII.

THE BURDEN IS ON THE PETITIONERS TO SHOW WHICH OF THE CLAIMED FEES AND EXPENSES ARE FOR SERVICES WHICH DIRECTLY PRODUCED THE BENEFIT, IF ANY, TO MOPAC.

If the petitioners are unable to meet the above burden, all claims against MOPAC should be disallowed, though as stated, supra, the objectors take no position as to whether the petitioners are entitled to fees from other parties or classes in this matter. See Dann v. Chrysler Corp., 215 A. 2d 709 (1965)

VIII.

IN DETERMINING WHAT FEES, IF ANY, SHOULD BE ALLOWED, CONSIDERATION SHOULD BE GIVEN TO THE DUPLICATION OF EFFORT BY PETITIONERS AND THE OFFSETTING OF EXPENSES INCURRED BY MOPAC IN DEFENDING CLAIMS WHICH HAD NO MERIT.

As the court said in Missouri Pacific Railroad v.

Slayton, 407 F. 2d 1078, at 1082 (1969): "There is no evidence in the record as to what expense MOPAC incurred for its representation by counsel in plaintiffs' suits and it would be entirely speculative to say that the benefit MOPAC received from the litigation exceeds the expense it has incurred in connection with the litigation." The offsetting expense factor was taken into consideration in Dann v. Chrysler Corp., 215A A. 2d 709 at 717 (1965). On page 11 of the Court's Opinion approving fees, Judge Weinfeld states that "in some measure the activities of the Levin-LeVesseur attorneys and Alleghany's ran a parallel course ... "

IX.

NO FEES MAY BE AWARDED FOR SERVICES PERFORMED BY THE PLAINTIFFS' ATTORNEYS IN THE VOTING RIGHTS ACTION.

The District Judge expressed serious doubts as to the propriety of granting these based on services performed in the voting rights case. The corporate defendants specifically disclaimed any agreement to pay such fees. Appendix Page 9 ~~(Memorandum of Corporate Defendants in Answer to Fee Applications, page 3)~~ The position of the corporate defendants is readily understood. Had they agreed to the payment of such fees, they would be in the position of agreeing to pay for services for which the Eighth Circuit Court of Appeals has ruled they have no obligation. Such voluntary payment by MOPAC at the behest of MRC, which controls it, would raise serious questions as to whether a derivative action would lie by a minority Class A

stockholder against MRC to recover such voluntary payment by MOPAC.

The District Court allowed fees for these services by again using the erroneous criteria that the settlement agreement contemplated the payment of fees to the attorneys of the minority Class B stockholders for services rendered to such stockholders. (See argument to the contrary above) Under this theory he viewed all of the reasons for the disallowance of the fees in the Slayton case to be irrelevant. It is the Objectors' position that on the contrary all of the reasons for the disallowance of fees in that case are controlling here, and that the determining factor is not the benefit derived by B stockholders from those services, but that derived by MOPAC from those services. Alleghany obviously concurs in this position since it has made no claim for reimbursement for attorney's fees based on such prior services.

A. The Slayton decision in res judicata on the question of the allowance of fees in the voting rights litigation.

"The doctrine of res judicata embodies two main rules which may be stated as follows: (1) The judgment or decree of a court of competent jurisdiction on the merits concludes the parties and privies to the litigation and constitutes a bar to a new action or suit involving the same cause of action either before the same or any other tribunal. (2) Any right, fact, or matter in issue, and directly adjudicated on, or

necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered on the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies. (50 C.J.S. 11)

The decision in Slayton was on the merits and involved MOPAC and these petitioners in their quest to obtain fees for the voting rights litigation. Fees for the voting rights litigation were denied, and these Objectors submit that this decision should be binding on the instant case under the doctrine of res judicata. It should be noted that the attorneys for plaintiff, LeVasseur, spent 1,227 hours out of a total of 3,388-3/4 hours on the voting rights litigation (Appendix page 5).

The attorneys for plaintiff, Levin, spent 5,538-1/4 hours out of a total of 6,466 hours on the voting rights litigation (Appendix page 6).

B. Without regard to the Slayton decision, the Court may not allow fees based on prior litigation which involved different issues -- voting rights in the first case, and dividend rights in the second case.

While it is true that the allowance in a derivative or class suit may include services rendered in a different proceeding and a different forum, provided that they are sufficiently related to the ultimate recovery, this rule is not applicable here because the services rendered here are not

related to the voting rights controversy.

The recapitilization could have occurred regardless of the outcome of the voting rights case. The District Judge did not allow fees for services in the voting rights case on the theory that the two cases are part of a continuous effort to obtain fair dividends for Class B stockholders, but on the erroneous theory that there existed an agreement by the corporate defendants to pay attorneys' fees for all prior and current litigation which the Class B stockholders would otherwise pay.

X.

THE DISTRICT COURT ERRED IN FINDING THAT "UNDER THE TERMS OF THE SETTLEMENT, THE ALLOWANCES AWARDED BY THE COURT ARE TO BE PAID EQUALLY BY THE DEFENDANTS, MISSISSIPPI RIVER CORPORATION AND MOPAC." EVEN IF THE AGREEMENT HAD PROVIDED FOR EQUAL SHARING, THE COURT SHOULD HAVE NEVERTHELESS APPORTIONED THE COSTS IN PROPORTION TO THE BENEFITS RECEIVED BY EACH.

The word "equally" appears nowhere in the settlement agreement, or the stipulation of settlement. These agreements were drafted by attorneys who are among the most skilled in matters of this kind in the country. They do not and did not here create patent ambiguities in any document they prepared. Had they intended that the allowances be paid "equally" by the corporate defendants, they would have so stated. The omission is obviously deliberate. They were fully aware that MOPAC is a subsidiary controlled by Mississippi, that Mississippi

had a substantial interest in the settlement distinctly different from that of all of the stockholders of MOPAC. Any division of payments between the two corporations might adversely affect the minority stockholders in MOPAC. It is well settled that dominant or controlling shareholders who exercise control over a corporation are fiduciaries. (Pepper v. Litton, 308 U.S. 295 (1939); Southern Pacific v. Bogert, 250 U.S. 483 (1919)). The corporations obviously prefer that the court determine the portion that should be borne by each.

This device has judicial precedents. In Getty Oil Co. v. Skelly Oil Co., 225 A. 2d 717 (Del. Chan. (1969) a corporation and its subsidiary sought a determination by the court as to whether a parent company was required to share its allocation of quotas for importation of oil with its subsidiary, 29% of whose stock was held by the public. The parent filed an action for a declaratory judgment and the subsidiary counterclaimed. Both moved for summary judgment. The court held for the subsidiary and quoted with approval from Myerson v. El Paso Natural Gas Co., 246 A. 2d 789 (Del. Chan. 1967): "... But the nature and extent of fiduciary duty depend upon the circumstances and the relationship of the parties in each case. Where the problem concerns duty of majority stockholders to the minority, or, more specifically, as here, parent corporation to minority stockholders of its subsidiary, the basic question is almost always one of fact: Were the minority stockholders fairly treated? ... The test to be here applied, therefore, is that of

fairness." (225 A. 2d 720) The court went on to say: "Here the court need look no further than the fairness test because an apportionment formula approximating what fair arm's length bargaining would probably have yielded is available." (225 A. 2d 721) Here the court was required to fairly apportion the fees to be paid between parent and subsidiary. This would be true even if the corporations had agreed to pay the allowances equally.

Had the Court undertaken to do so and arrived at a conclusion that the payments should be made equally, it would have discharged its responsibility. But the Court did not reach this question because it misconstrued the agreement by inserting the vial word "equally" in an agreement where it does not appear and was not intended to appear. The incongruity of such a construction is apparent from the results it created. The District Judge reduced the allowance of fees to attorneys for the individual plaintiffs by $250,000.00, thereby reducing the amount to be paid by Mississippi by $125,000.00. Mississippi had indicated it was ready to pay $1,000,000.00 in fees. The welfare of Mississippi stockholders is not a concern of the Court. The offer by the defendant to pay $1,000,000.00 in fees in connection with a settlement in which it is one of the prime beneficiaries which was charged with misconduct and from which damages were sought was in part rejected by the Court. To what purpose? If any reduction of fees is to be made, it should accrue to MOPAC, whose stockholders are the concern of the Court

since it is the company that is being reorganized, whose minority Class A stockholders are parties to the proceeding who received little, of any, benefit from the settlement and the allowance of fees against whom is being vigorously contested by these Objectors. See IV, supra.

CONCLUSION

The trial court erred in allowing fees and expenses to the petitioners to be paid by MOPAC. The judgment allowing fees and expenses to be paid by MOPAC should be reversed.

Respectfully submitted.

MICHAEL PAUL COHEN
7319 North Oakley
Chicago, IL 60645

WILLIAM HEIMOWITZ
535 Fifth Avenue
New York, NY 10017

~~312—647-0001~~

MICHAEL PAUL COHEN
Attorney at Law
~~7581 MILWAUKEE AVENUE, SUITE 105~~
~~NILES, ILLINOIS 60648~~
7319 N. Oakley
Chicago, Ill 60645

LAW OFFICES OF
GERALD EISEN

Clerk, Court of Appeals
Second Circuit

Levin v. Mississippi
Jacob R. Cohen, Appellant, objector
T-74-8274
74-2104

Dear Sir,

Enclosed please find 25 copies of my brief and 10 copies of my appendix in the above captioned matter pursuant to the F.R.A.P. It should be noted that the docket number used on my brief and appendix, T-74-8274, was used on a form 6.1(a) ov. sent to my New York counsel on August 7, 1974.

I certify that I have served two copies of my brief and one copy of the appendix on counsel for each party.

Sincerely,

Michael Paul Cohen